

A Mohd Johi bin Said & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEALS NO P-05-34 OF 2000 AND NO P-05-35 OF 2000

B GOPAL SRI RAM, HASHIM YUSOFF AND TENGKU BAHARUDIN SHAH
JJCA

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Criminal Procedure — Appeal — Appellate court, power and duty of — Whether approach of appellate court in civil appeal different from approach in criminal appeal — Whether appellate court in criminal appeal merely to consider if conviction safe

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Criminal Procedure — Appeal — Evidence — Evidence of defence witness neither accepted nor rejected by trial judge — Trial judge merely reciting in brief evidence of witness — Whether trial judge had misdirected himself

D *Criminal Procedure — Appeal — Grounds of — Error of trial judge in handling facts — Whether appellate interference warranted*

Criminal Procedure — Defence — Court, duty of — Serious defence put forward — Whether bounden duty of court to consider defence — Whether failure to judicially appreciate defence constituted a non-direction by judge to himself

E

Criminal Procedure — Defence — Statement from the dock — Accused's evidence from dock consistent with evidence led by prosecution — Accused's statement rejected by trial judge — Whether rejection constituted a serious error — Whether trial judge failed to judicially appreciate evidence

F *Evidence — Agent provocateur — Use of — Judge made aware of possibility that agent provocateur's evidence tainted — Whether judge should have approached such evidence with caution — Whether judge ought to have warned himself of danger of acting on such evidence*

G *Evidence — Conflicting testimony — Approach to take — Judge failed to address conflict — Whether judge erred in handling of facts — Whether appellate interference warranted*

H The appellants were tried in the High Court with one Abdul Rahman bin AbShatar (DW1) for trafficking in dangerous drugs contrary to s 39B(2) of the Dangerous Drugs Act 1952. The prosecution's case, mainly based on the evidence of PW3 — an agent provocateur — was that there was a sale of the drugs by the appellants to PW3. PW3 testified that upon an informer's introduction to the second appellant, he entered into negotiations with the second appellant for a proposed sale of drugs. Several meetings were held and at one of those meetings, the first appellant was present. Subsequently, a meeting was arranged at Bukit Mertajam. Unknown to the appellants, a police party planned an ambush. PW3 arrived first at the meeting point, followed by the

I second appellant and later the first appellant driving motorcar PCN 6527 with DW1 as passenger. When DW1 alighted from the car, the police party sprung

into action and arrested DW1 and both appellants. The prosecution alleged that the drugs in question were found and recovered from the front passenger seat of motorcar PCN 6527. At the close of the prosecution's case, DW1 was acquitted but both the appellants were ordered to enter their defence. Both appellants gave statements from the dock. DW1 testified on behalf of the defence. The appellants denied that they sold or agreed to sell any drugs to PW3. The first appellant denied that the drugs in question had ever been in motorcar PCN 6527. DW1's evidence was that there had been no bag or anything else in the interior of motorcar PCN 6257. In effect, he testified that the drugs in question were not where they were found later by the prosecution witnesses. DW1 further testified of having heard someone say 'put the thing in car PCN'. However, the High Court judge found the appellants guilty, convicted them and sentenced them to the mandatory death penalty. The appellants appealed to the Court of Appeal. The appellants' counsel raised inter alia the following complaints: (i) the judge had failed to judicially appreciate the evidence PW3; (ii) the judge erred in rejecting the first appellant's statement from the dock; and (iii) the judge failed to appreciate DW1's evidence.

Held, allowing the appeal and quashing the convictions:

- (1) On the facts, the judge had two versions before him. First, the prosecution's version that there had been a sale or at least an attempted sale of the drugs in question. Next, the defence version that there was no sale but that the drugs had been planted in motorcar PCN 6527. The question that the judge had therefore to resolve was whether this was a case of trafficking or 'a plant'. Unfortunately, the judge did not anywhere in his written grounds of judgment address his mind to this critical issue. The judge therefore erred in his handling of the facts. It is settled law that an error by a trial judge in his handling of the facts would warrant appellate interference and is a ground for quashing a conviction (see para 5).
- (2) The trial judge was made aware that PW3's evidence could be tainted. It was therefore his duty to approach the evidence of PW3 with caution and to warn himself of the danger of acting on his evidence. It was of course open to the judge, after warning himself thus and for good reasons to have found PW3 credible. He could then have acted on PW3's evidence and no serious complaint could have been made about it. However, nowhere in his judgment did the trial judge adopt such an approach. There was thus merit in counsel's submission that the judge had applied the wrong test when considering PW3's evidence and that his judgment was therefore fatally flawed on this ground. The learned judge had turned an indulgent eye upon PW3's evidence when he should have treated it with extreme caution (see para 7).
- (3) The first appellant's evidence from the dock was consistent with PW3's evidence. By rejecting the first appellant's statement from the dock, the

- A** judge had therefore rejected so much of the defence evidence that was consistent with that led by the prosecution. This was a serious error and fell far short of the proper approach that a judge should take when judicially appreciating evidence (see para 8).
- B** (4) It was essential that the evidence of DW1 be given due consideration and either accepted or rejected. Unfortunately, the judge did nothing further than recite in brief the evidence of this witness in his judgment. This was thus a serious non-direction which amounted to a misdirection by the judge (see para 9).
- C** (5) In the instant case, there was a serious defence, supported by credible evidence presented to the court. It was the bounden duty of the trial judge to consider that defence. This was not done. There was no judicial appreciation of the defence case. This was accordingly a case of non-direction by the judge unto himself (see para 10 and 11); *Balasingham v PP* [1959] MLJ 193 and *Gooi Loo Seng v PP* [1993] 2 MLJ 137 followed.
- D** (6) Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance were wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe. In the instant case, that question had to receive a negative response (see para 12).
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[Bahasa Malaysia summary]

- F** Perayu-perayu dihadapkan di Mahkamah Tinggi bersama dengan Abdul Rahman bin Ab Shatar (DW1) kerana mengedar dadah berbahaya bertentangan dengan s 39B(2) Akta Dadah Berbahaya 1952. Kes pihak pendakwa, khususnya berdasarkan keterangan PW3 — seorang ejen provocateur — adalah bahawa terdapat satu jualan dadah oleh pihak perayu kepada PW3. PW3 memberi keterangan bahawa setelah diperkenalkan oleh pemberi maklumat kepada perayu kedua, beliau telah membuat beberapa perundingan dengan perayu kedua untuk satu cadangan jualan dadah. Beberapa pertemuan telah diadakan dan di salah satu pertemuan itu, perayu pertama hadir. Berikutan itu, satu pertemuan telah diatur di Bukit Mertajam. Tanpa diketahui oleh pihak perayu, sepasukan polis telah merancang satu serang hendap. PW3 tiba dahulu di tempat pertemuan, diikuti oleh perayu kedua dan kemudian perayu pertama telah memandu kereta PCN 6527 dengan DW1 sebagai penumpang. Apabila DW1 turun daripada kereta itu, pasukan polis itu bertindak dan menangkap DW1 dan kedua-dua perayu. Pihak pendakwa mengatakan bahawa dadah yang dipersoalkan ditemui dan didapati berada di tempat duduk hadapan penumpang dalam kereta PCN 6527. Di penutup kes pihak pendakwa, DW1 telah dibebaskan tetapi kedua-dua perayu diperintahkan memasuki pembelaan mereka. Kedua-dua perayu telah memberikan keterangan darikandang orang salah. DW1 telah
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memberi keterangan bagi pihak pembela. Pihak perayu menafikan yang mereka telah menjual atau bersetuju untuk menjual apa-apa dadah kepada PW3. Perayu pertama menafikan bahawa dadah yang dipersoalkan berada dalam kereta PCN 6527. Keterangan DW1 adalah bahawa tiada beg atau apa-apa dalam kereta PCN 6257. Oleh itu, beliau memberi keterangan bahawa dadah yang dipersoalkan tidak berada di tempat ia ditemui kemudiannya oleh saksi-saksi pihak pendakwa. DW1 kemudian memberi keterangan telah mendengar seseorang berkata 'letakkan barang itu dalam kereta PCN'. Bagaimanapun, hakim Mahkamah Tinggi mendapati perayu-perayu bersalah, mensabit dan menjatuhkan hukuman mati mandatori ke atas mereka. Pihak perayu telah membuat rayuan kepada Mahkamah Rayuan. Peguam pihak perayu telah menimbulkan, antara lain, aduan-aduan berikut: (i) hakim telah gagal untuk menilai keterangan PW3 dengan sewajarnya; (ii) hakim terkhilaf apabila menolak keterangan perayu pertama dari kantung orang salah; dan (iii) hakim telah gagal menilai keterangan DW1 sewajarnya.

Diputuskan, membenarkan rayuan tersebut dan membatalkan sabitan-sabitan tersebut:

- (1) Berdasarkan fakta-fakta, hakim mempunyai dua versi di hadapan beliau. Pertama, versi pihak pendakwa bahawa terdapat satu jualan atau sekurang-kurangnya cubaan menjual dadah yang dipersoalkan itu. Kedua, versi pihak pembela bahawa tidak terdapat jualan tetapi bahawa dadah telah diletakkan dalam kereta PCN 6527. Persoalan yang perlu diselesaikan oleh hakim adalah sama ada ini merupakan satu kes pengedaran atau 'aplan'. Namun begitu, hakim tidak langsung memberi pendapat tentang persoalan kritikal ini dalam mana-mana bahagian alasan penghakiman bertulis beliau. Hakim oleh itu terkhilaf dalam mengendalikan fakta-fakta tersebut. Adalah undang-undang tetap bahawa satu kekhilafan oleh hakim perbicaraan dalam pengendalian fakta beliau akan mewarankan campur tangan pihak rayuan dan merupakan alasan baik untuk pembatalan satu sabitan (lihat perenggan 5).
- (2) Hakim perbicaraan telah dimaklumkan bahawa keterangan PW3 mungkin telah dicemari. Oleh itu adalah tugas beliau untuk meneliti keterangan PW3 dengan berhati-hati dan berjaga-jaga tentang bahaya bertindak berdasarkan keterangan beliau. Ia adalah terbuka kepada hakim, selepas memberi amaran kepada dirinya dan untuk sebab-sebab baik kemudiannya mendapati bahawa PW3 boleh dipercayai. Beliau kemudiannya boleh bertindak berdasarkan keterangan PW3 dan tiada aduan serius boleh dibuat terhadapnya. Namun begitu, hakim perbicaraan tidak langsung menggunakan pendekatan itu dalam penghakiman beliau. Oleh itu terdapat merit dalam hujah peguam bahawa hakim telah menggunakan ujian yang salah apabila menentukan keterangan PW3 dan bahawa penghakiman beliau telah cacat berdasarkan alasan ini. Hakim yang bijaksana telah

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- A** terlepas perhatian berhubung keterangan PW3 apabila beliau sepatutnya menelitinya dengan penuh hati-hati (lihat perenggan 7).
- (3) Keterangan perayu pertama dari kandang orang salah adalah konsisten dengan keterangan PW3. Dengan menolak keterangan perayu pertama dari kandang orang salah hakim dengan itu seperti menolak keterangan pembelaan yang konsisten dendan keterangan yang telah dikemukakan oleh pihak pendakwa. Ini satu kekhilafan serius dan bukan satu pendekatan betul yang patut diambil oleh seorang hakim apabila mengadili keterangan dengan sewajarnya (lihat perenggan 8).
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- C** (4) Adalah penting yang keterangan DW1 dipertimbangkan dengan teliti dan hendaklah diterima atau ditolak. Namun, hakim tidak berbuat apa-apa pun selain menyatakan sambil lalu keterangan saksi ini dalam penghakiman beliau. Ini merupakan satu salah arah yang serius oleh hakim (lihat perenggan 9).
- D** (5) Dalam kes semasa, terdapat pembelaan yang serius, disokong dengan keterangan yang boleh dipercayai dihadapkan di mahkamah. Adalah tugas utama hakim perbicaraan untuk menimbang pembelaan itu. Inididak dilakukan. Tiada pengadilan sewajarnya dalam kes pihak pembela. Ini merupakan satu kes yang tiada arahan oleh hakim sendiri (lihat perenggan 10 dan 11); *Balasingham v Public Prosecutor* [1959] MLJ 193 and *Gooi Loo Seng v PP* [1993] 2 MLJ 137 diikuti.
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- (6) Tidak seperti rayuan sivil, di mana perayu mempunyai beban membuktikan bahawa hakim pada awalnya terkhilaf, dalam satu kes jenayah tugas mahkamah adalah untuk menentukan sama ada sabitan adalah betul. Pendekatan betul oleh itu bukanlah sama ada keputusan itu salah tetapi sama ada sabitan itu selamat. Dalam kes semasa, persoalan tersebut dijawab secara negatif (lihat perenggan 12).]
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Notes

- G** For a case on statement from the dock, see 5(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 1625.
For cases on appellate court, power of, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 215–218.
For cases on approach to take on conflicting testimony, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 748–758.
- H** For cases on evidence in appeal, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 255–294.
For cases on grounds of appeal, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 374–387.
For cases on the duty of court, see 5 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1446–1457.
- I** For cases on use of agent provocateur, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 242–243.

Cases referred to

Alcontara a/l Ambross Anthony v Public Prosecutor [1996] 1 MLJ 209 (refd)
Balasingham v Public Prosecutor [1959] MLJ 193 (folld)
Chow Kok Keong v Public Prosecutor [1998] 2 MLJ 337 (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137 (folld)
Mohammad Husain v Emperor AIR 1945 Nag 441 (refd)
Zahari bin Yeop Baai v PP [1980] 1 MLJ 160 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(2)

Appeal from: Criminal Trial No 45–3 of 1998 (High Court, Pulau Pinang)

Harpal Singh (Harpal Singh & Co) for the appellant in Criminal Appeal No P–05–34 of 2000.

G Ravishankar (Harpal Singh & Co) for the appellant in Criminal Appeal No P–05–35 of 2000.

Nurulhuda Nur'aini bte Mohd Noor (Senior Federal Counsel) for the appellant in Criminal Appeals No P–05–34 of 2000 and No P–05–35 of 2000.

Gopal Sri Ram JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellants before us together with one Abdul Rahman bin Ab Shatar were charged for trafficking in 4829 grams of cannabis contrary to s 39B(2) of the Dangerous Drugs Act 1952. The learned judge acquitted Abdul Rahman at the close of the prosecution case. There is no appeal by the public prosecutor against that order. The judge however called for the defence of the appellants. Each of them made a statement from the dock. Abdul Rahman then gave evidence for the defence as DW1. At the close of the whole case the learned judge found the case against the appellants proved. He convicted them and sentenced them to the mandatory death penalty. The appellants now appeal to us. We heard this appeal on 8 September 2004 and adjourned it for continued hearing yesterday. At the conclusion of arguments, we adjourned the appeal to today for our decision.

FACTS

[2] The facts here are fairly straightforward. The prosecution case, which is mainly based on the evidence of PW3, is that there was a sale of the drug in question by the appellants to PW3 who had acted throughout as agent provocateur. According to the story as told by PW3, on 18 October 1997, he proceeded to a stall in front of a sawmill at the Grik base camp. He met his informer there. The informer told him that there was a Malay who was trafficking

- A** in drugs and furnished PW3 with the background and identity of the person concerned. He was then introduced to a male Malay who called himself 'Sham' who is Rohaisam bin Othman (the second appellant) before us. PW3 introduced himself as 'Isa'. Thereafter, according to PW3 negotiations were conducted between himself and the second appellant for the proposed sale of the drugs by the second appellant. It is also part of PW3's evidence that Mohd Johi bin Said (the first appellant) was present at one of the meetings that PW3 had with the second appellant concerning the sale of drugs.

- [3]** PW3 also testified that a meeting was arranged at Bukit Mertajam on 14 November 1997 at 7.30pm, between himself and the appellants. The police planned an ambush at the scene. PW3 arrived at the scene at about 8pm. About an hour later the first appellant and Abdul Rahman arrived in a motor car No PCN 6527. The second appellant had arrived earlier. According to the prosecution evidence, Abdul Rahman alighted from the car and stood near it. Thereafter, the trap set by the police was sprung and all three suspects were arrested. The prosecution case is that the drugs in question were found and recovered from the front passenger seat of the motor car No PCN 6527.

- [4]** The appellants' case is quite different. According to both appellants, they were introduced to PW3 with a view to their being recruited as police informers. In their respective statements made from the dock, they denied that they had sold or agreed to sell any drugs to PW3. The first appellant denied that the drug in question had ever been in motor car No PCN 6527. His counsel put to PW5 (DSP Yusuh, the leader of the ambush party) during cross-examination that the drug had not been found in motor car No PCN 6527. The defence case as put to prosecution witnesses implied therefore that the drug had been planted in motor car No PCN 6527. Further, DW1 gave evidence that he had taken a lift from the second appellant to the scene of the ambush. While travelling he did not see any bag in the front passenger seat, on the floorboard or anywhere else inside the car. On arrival at the scene, DW1 went to ease himself. After that there was a commotion. He heard someone say: 'Letak barang dalam kereta PCN'. (Put the thing in car PCN'). He was then blindfolded, handcuffed and severely assaulted. We may add that from the printed record it is fairly plain that DW1 was subjected to strenuous cross-examination which he withstood and emerged from the witness box with his credibility unscathed.

- H** THE LEARNED JUDGE'S APPROACH

- [5]** The learned judge therefore had two versions before him. First, the prosecution's version that there had been a sale or at least an attempted sale of the drugs in question. Next, the defence version that there was no sale but that the drugs had been planted in motor car No PCN 6527. The question that the learned judge had therefore to resolve was whether this was a case of trafficking or 'a plant'. Unfortunately, the learned judge did not anywhere in

his written grounds of judgment address his mind to this critical issue. In our respectful view, the learned judge therefore erred in his handling of the facts. It is settled law that an error by a trial judge in his handling of the facts is a ground for quashing a conviction. See *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337; *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209. Accordingly this is a case warranting appellate interference.

[6] There are three further criticisms that were levelled by learned counsel for the appellants against the learned trial judge's approach to the case. The first relates to the failure on the part of the learned judge to judicially appreciate the evidence PW3. Our attention has been drawn to those parts of the PW3's evidence where he was confronted and contradicted by other material. In his evidence in chief, PW3 asserted that he had given evidence in other cases and that his evidence in those cases had been accepted and acted upon by other courts. Under cross-examination, counsel confronted PW3 with the records in a case from Taiping where the court in its judgment had unqualifiedly rejected his evidence on the ground that he was not a credible witness and that his evidence was inconsistent.

[7] Now, this is a serious matter. The learned trial judge was being made aware that he had before him a witness whose evidence may be tainted. It was therefore his duty to approach the evidence of PW3 with caution and to warn himself, of the danger of acting on his evidence. It was of course open to the learned judge, after warning himself thus and for good reasons to have found the witness credible. He could then have acted on the witness' evidence and no serious complaint could have been made about it. However, nowhere in his judgment did the learned trial judge adopt such an approach. We therefore find merit in counsel's submission that the learned judge applied the wrong test when considering PW3's evidence and that his judgment is therefore fatally flawed on this ground. We may also add that the learned judge turned an indulgent eye upon PW3's evidence when he should have treated it with extreme caution.

[8] The second complaint advanced by learned counsel relates to the learned judge's handling of the defence evidence. In his judgment the learned judge rejected the first appellant's statement from the dock on the ground that no reason had been given by that appellant for telephoning PW3. However, even a cursory reading of the first appellant's statement makes it clear that he did give a reason for calling PW3 on 13 November 1997. He said that he was instructed by PW3 to do so about three or four weeks after their first meeting. And if you look at PW3's evidence, that is precisely what that witness says. The learned judge therefore rejected so much of the defence evidence that was consistent with that led by the prosecution. This is a serious error and falls far short of the proper approach that a judge should take when judicially appreciating evidence.

- A** [9] The third ground of complaint relates to the appreciation of DW1's evidence. As already stated, DW1's evidence was that there had been no bag or anything else in the interior of motor car No PCN 6257. In short, he was saying that the drug in question was not where it was found later by the witnesses for the prosecution. Additionally, this witness had heard someone
- B** say that 'put the thing in car PCN'. On these facts, it was essential that the evidence of DW1 be given due consideration and either accepted or rejected. Unfortunately, the learned judge did nothing further than recite in brief the evidence of this witness in his judgment. This is a serious non-direction which amounts to a misdirection by the learned judge. And the learned deputy before us had perforce to concede the point.
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- D** [10] We have here a case where a serious defence, supported by credible evidence was presented to the court. It was the bounden duty of the learned trial judge to consider that defence. This was not done. There was simply no judicial appreciation of the defence case. This is accordingly a case of non-direction by the learned judge unto himself. And we find it sufficient in this context to quote from two authorities merely to remind ourselves of the importance of the point that is being made. In *Balasingham v Public Prosecutor* [1959] MLJ 193, Ismail Khan J (later CJ Borneo) said:

- E** There was therefore a direct conflict of evidence and a serious defence cannot be summarily dismissed as an improbable story without adequate reasons for such a conclusion.

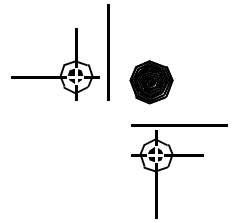
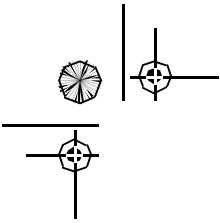
[11] In *Gooi Loo Seng v PP* [1993] 2 MLJ 137 at p 142, Edgar Joseph Jr SCJ when delivering the judgment of the Supreme Court said:

- F** Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that the non-direction amounts to a misdirection, for, in the words of Pickford J in *R v Bundy* 5 Cr App R 270:

- G** the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.

- H** We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

- I** [12] Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe. See *Mohammad Husain v Emperor* AIR 1945 Nag 441; *Zahari bin Yeop Baai v Public Prosecutor* [1980] 1 MLJ 160. That question, on the present facts, must receive a negative response.



THE RESULT

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[13] For the reasons already given, these appeals must be allowed. The convictions of the appellants are quashed. They shall forthwith be set at liberty.

Appeals allowed.

Reported by John Paul Simon

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